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COURT OF APPEALS
DIVISION II

2015 NOV 23 PM 1:16

STATE OF WASHINGTON

No. 47885-4-II

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROVIDENCE PHYSICIAN SERVICES CO.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and
ROCKWOOD HEALTH SYSTEM D/B/A VALLEY HOSPITAL,

Respondents

BRIEF OF RESPONDENT, ROCKWOOD HEALTH SYSTEM,
D//B/A VALLEY HOSPITAL

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	2
III.	ARGUMENT	5
	A. Standard of Review; Substantial Deference should be Accorded to the Department's Decision	5
	B. A CN is Required to Construct and Operate a Health Facility such as PPSC's Ambulatory Surgery Facility. 6	6
	C. PPSC's Claim that the Department has Consistently Allowed Large Health Systems to Utilize the Private Physician Practice Exemption is Not Supported by the Record and is Directly Contrary to the <i>MultiCare</i> Decision	9
	D. PPSC Inappropriately and Selectively Relies on a Few Past CN Program Analyst Decisions	13
	E. The <i>Amisub</i> Case is Clearly Distinguishable; and Other Red Herrings	15
IV.	CONCLUSION	17
	APPENDIX	19

TABLE OF AUTHORITIES

Table of Cases

<i>Amisub of South Carolina, Inc. v. South Carolina Dep't of Health and Env'tl. Control</i> , 403 S.C. 576, 743 S.E.2d 786 (2013)	15, 16
<i>Children's Hosp. and Medical Center vs. Washington State Department of Health</i> , 95 Wn. App. 858, 865, 975 P.2d 567 (1999)	6
<i>DaVita Inc. v. Department of Health</i> , 137 Wn.App. 174, 181-183, 887 P.2d 891 (2007)	14
<i>MultiCare Health System's Gig Harbor Ambulatory Surgery Center</i> , DOH Docket No. 06-07-C-2001CN (2007)	9, 10, 11, 12, 13
<i>MultiCare Health System v. Department of Health, State of Washington, et al.</i> , Court of Appeals No. 37157-0-II (2008)	12
<i>Overlake Hosp. Ass'n v. Dep't of Health</i> , 170 Wn.2d 43, 50, 239 P.3d 1095 (2010)	6
<i>Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.</i> , 112 Wn.2d 353, 355-56, 770 P.2d 1040 (1989)	6
<i>St. Joseph Hospital and Health Care Center vs. Department of Health</i> , 125 Wn.2d 733, 735-736, 887 P.2d 891 (1995)	6
<i>Univ. of Wash. Med. Ctr. v. Dep't of Health</i> , 164 Wn.2d 95, 103, 187 P.3d 243 (2008)	5, 6

Statutes

RCW 34.05.510	5
RCW 34.05.570(1)(a)	5
RCW 34.05.570(1)(d)	5
RCW Chapter 70.38	1, 7, 16
RCW 70.38.015	10

RCW 70.38.025(6)	1, 7
RCW 70.38.105(3)	6
RCW 70.38.105(4)(a)	1, 7
RCW 70.38.111	8

Regulations and Rules

WAC Chapter 246-310	1, 2
WAC 246-310-010	9
WAC 246-310-010(5)	1, 4, 7
WAC 246-310-020(1)	1, 7
WAC 246-310-040 through 045	2, 8, 16

Other Authorities

Wash. Admin. Law Practice Manual, § 10.05.	6
Merriam Webster's online dictionary, <u>http://www.merriam-webster.com/medical/private%20practice</u>	12

I. INTRODUCTION

This matter relates to the Certificate of Need (“CN”) program set forth in RCW Chapter 70.38 and WAC Chapter 246-310. In general, the construction, development, or other establishment of a health care facility is subject to the CN requirements. *See*, RCW 70.38.105(4)(a) and WAC 246-310-020(1). The term “health care facility” is defined in RCW 70.38.025(6) to include ambulatory surgical facilities such as that proposed by Providence Physician Services Co. (“PPSC”) here.

PPSC claims that its proposed ambulatory surgery facility is exempt from the CN requirements pursuant to WAC 246-310-010(5) because it will purportedly be in the offices of private physicians. PPSC’s exemption claim is without merit. The exemption does not apply because PPSC, and its proposed ambulatory surgery facility, are owned and controlled by Providence Health and Services, a large health care conglomerate that owns and operates hospitals and other health care facilities throughout the Pacific Northwest, not by member physicians.

PPSC now claims that the Department of Health’s Decision constitutes a new requirement and, thus, a rule which was not properly promulgated. This new claim is also without merit. Ambulatory

surgery facilities like that proposed by PPSC have been subject to the CN requirements since 1996. AR 619-620. Further, the exemption asserted by PPSC is not set forth anywhere in RCW Chapter 70.38 or in any of the delineated exemptions in WAC Chapter 246-310. *See*, WAC 246-310-040 through 045. There is no support in the record for PPSC's claim that the Department of Health has consistently allowed large health systems like Providence to avoid the CN requirements through a private physician exemption.

The Corrected Final Order on Summary Judgment, which is the Department of Health's final decision below (the "Decision"), is correct and should be upheld. The Decision correctly concludes that the ambulatory surgery facility proposed by PPSC, which is a owned and controlled by Providence Health and Services, is not entitled to an exemption but is subject to the CN requirements.

II. STATEMENT OF THE CASE

The Department of Health's March 26, 2013, Determination of Reviewability #13-03 initially held that the proposed construction of an ambulatory surgery center at the Providence Medical Park in Spokane Valley is exempt from CN review (the "Initial Determination"). The Initial Determination addressed an exemption request submitted by PPSC, which is a wholly owned subsidiary of Providence Health and

Services – Washington, d/b/a Providence Health Care, which in turn is a wholly owned subsidiary of Providence Health and Services (collectively referred to herein as “Providence”). Administrative Record (“AR”) 321.

Providence is a large health care conglomerate that owns and operates hospitals and other health care facilities throughout Alaska, Washington, Montana, Oregon, and California. AR 50, and 146-147.

PPSC is not owned or controlled by any physicians or group of physicians. Rather, PPSC is ultimately owned and controlled by Providence. AR 71 and 321. PPSC represented in its exemption request that its physician practice is not a solo practice, a group practice, or an IPA, and confirmed that the sole shareholder of PPSC is Providence. AR 321. PPSC checked the “other” box in response to the inquiry about its clinical practice because it is owned by a large corporate entity. *Id.*

In short, PPSC’s proposed ambulatory surgery facility is not a private group practice, but is part of a large, non-physician health care system. Nevertheless, the Department initially granted PPSC’s exemption request, concluding that “the proposed ASC would be exempt from Certificate of Need review” subject to certain conditions. AR 316.

Rockwood Health System, d/b/a Valley Hospital, an interested and affected party, timely requested an adjudicative proceeding to challenge the Initial Determination. Rockwood's position is that the PPSC ambulatory surgery facility does not satisfy the criteria for an exemption from the CN requirements under WAC 246-310-010(5) because, as PPSC acknowledged in its application, it is not a private or group practice of physicians. AR 321. Thus, the PPSC ambulatory surgery facility is subject to the CN requirements.

The Department's CN Program subsequently reconsidered its Initial Determination and now agrees that the PPSC ambulatory surgery facility does not qualify for the private physician practice exemption under WAC 246-310-010(5). AR 41. Likewise, the Department's Review Judge and its Review Officer both held that, because the PPSC physicians are not private physicians but are employees of a large health care system, the PPSC ambulatory surgery facility is not entitled to the private physician practice exemption and is subject to the CN requirements. AR 223-230, and 307-311.

Providence, apparently recognizing the tenuous basis for its exemption request, subsequently filed on November 14, 2013, an application for a CN to operate its ambulatory surgery facility. AR 145. Significantly, the applicant for this CN was Providence Health

Services – Washington, the corporate umbrella for the large Providence health system, and not PPSC. *Id.* The CN Program issued a CN for the Providence ambulatory surgery facility on October 20, 2014. That decision is currently under administrative adjudication in DOH Case No. M2014-1290.

III. ARGUMENT

A. Standard of Review; Substantial Deference Must be Accorded to the Department's Decision.

The Washington Administrative Procedure Act (WAPA) provides the “exclusive means of judicial review of agency action.” RCW 34.05.510. PPSC, as the appellant, bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a). PPSC must prove that the Department misunderstood or violated the law, or made decisions without substantial evidence. RCW 34.05.570(1)(a); *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008). Relief may only be granted if the Court determines that PPSC has been “substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

The Washington State Supreme Court has specifically addressed the standard of review in CN cases. See, *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102. Questions of law are reviewed under the error of law standard, but the court “accord[s] substantial deference to

the agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise." *Id.*, see also *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010) (according the Department of Health substantial deference in interpreting CN laws). For mixed questions of law and fact the court still accords factual matters with "judicial deference under the substantial evidence standard." Wash. Admin. Law Practice Manual, § 10.05. Finally, the court will not reweigh the evidence. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 103 (citing *Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.*, 112 Wn.2d 353, 355-56, 770 P.2d 1040 (1989)).

B. A CN is Required to Construct and Operate a Health Facility such as PPSC's Ambulatory Surgery Facility.

One of the main purposes of the CN provisions is to control health care costs by ensuring better utilization of existing health care facilities and services. *Children's Hosp. and Medical Center vs. Washington State Department of Health*, 95 Wn. App. 858, 865, 975 P.2d 567 (1999) (quoting *St. Joseph Hospital and Health Care Center vs. Department of Health*, 125 Wn.2d 733, 735-736, 887 P.2d 891 (1995)); and RCW 70.38.105(3). The CN statutory scheme was designed, in part, to control rapidly rising health care costs by limiting

competition within the health care industry and, therefore, protect existing facilities from competition "unless a need for additional services" can be demonstrated. *St. Joseph*, 125 Wn.2d at 742. As the Washington State Supreme Court stated in *St. Joseph*, at 736:

The CN program seeks to control costs by ensuring better utilization of existing institutional health services and major medical equipment.

Generally, the construction, development, or other establishment of a health care facility is subject to the CN requirements. RCW 70.38.105(4)(a) and WAC 246-310-020(1). The term "health care facility" is defined in RCW 70.38.025(6) to include ambulatory surgical facilities. The term "ambulatory surgical facility" is not defined in RCW Chapter 70.38, but is defined in WAC 246-310-010(5) as follows:

"Ambulatory surgical facility" means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. ***This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.*** (Emphasis added.)

PPSC's exemption claim is based upon the private physician practice language highlighted above in WAC 246-310-010(5). But PPSC's reliance on the purported private physician practice exemption

is not supported by the statutory scheme or by the corporate structure of PPSC and Providence. Indeed, PPSC's request specifically acknowledges that its proposed ambulatory surgery facility is not a solo or group practice. AR 321. The CN application for the project also confirms that its true owner is Providence. AR 145.

The private physician practice exemption must be viewed in the context of the underlying statutory scheme. RCW Chapter 70.38 does not exclude private physician offices or group practices from the definition of health care facility. Further, while RCW 70.38.111 sets forth various exemptions to the certificate of need requirements, none of these statutory exemptions apply to ambulatory care facilities, ambulatory surgical facilities, or private physician offices.

While, WAC 246-310-040 through 045 specifically set forth various exemptions to the CN requirements, none of these delineated exemptions apply to ambulatory care facilities, ambulatory surgical facilities, or private physician offices. In short, the purported private physician practice exemption is neither authorized by statute, nor is it specifically listed in any of the exemptions listed in the regulations.

As the Department's Review Judge correctly concluded below, the private physician practice exemption must be narrowly construed because there is no statutory authority for it. AR 229 (Conclusion of

Law 2.8). This was also essentially the conclusion of the Department's Adjudicative Services Unit in *MultiCare Health System's Gig Harbor Ambulatory Surgery Center*, DOH Docket No. 06-07-C-2001CN (see, AR 614-627).

C. PPSC's Claim that the Department has Consistently Allowed Large Health Systems to Utilize the Private Physician Practice Exemption is Not Supported by the Record and is Directly Contrary to the MultiCare Decision.

The issue of whether a large non-physician health care entity such as Providence can qualify for the private physician practice exemption was previously addressed in the Department of Health's Adjudicative Services Unit in *MultiCare Health System's Gig Harbor Ambulatory Surgery Center*, DOH Docket No. 06-07-C-2001CN. The Health Law Judge in *MultiCare* concluded as a matter of law that MultiCare's proposed ambulatory surgery project was not exempt from the CN requirements because the exemption only applies to physicians who practice privately and separate from a large non-physician health care entity. Conclusion of Law 2.8 in *MultiCare* specifically states, in part, as follows:

RCW 70.38.111 lists the certificate of need exemptions. In this statute, the legislature did not include an exemption for any type of freestanding ASC. Within this statutory context, it would be reasonable to conclude that the legislature did not intend that regulations be interpreted so broadly that the CN oversight of ASCs

would be eroded with large exemptions. Multicare's technical definition is inconsistent with the purpose of the CN laws for a planned and orderly development of health services that avoids unnecessary duplication of services. Multicare's broad definition would create such an enormous exemption in the CN regulation of ASCs, that it would undermine the goals of controlling costs by ensuring better utilization of existing health care facilities and services. RCW 70.38.015.

AR 623.

The *MultiCare* Health Law Judge also noted that the regulatory history behind WAC 246-310-010 reflects the intent that projects such as that proposed by PPSC here are subject to the CN requirements.

Conclusion of Law 2.3 in *MultiCare* provides as follows:

Prior to 1996, hospital-licensed outpatient surgery centers, located on or off the hospital campus, did not fall within the definition of an "ambulatory surgical facility" under WAC 246-310-010. Therefore, hospitals did not need to acquire a CN before establishing an outpatient surgery center (department) on or off campus. WAC 246-310-010 was amended in 1996 to include hospital off-campus outpatient surgery centers. The regulation was amended to level the playing field. The former regulatory language provided hospitals with an unfair competitive advantage over non-hospital ambulatory surgery facilities because hospital outpatient surgery centers were not subject to CN review. (Footnote omitted).

AR 619-620.

PPSC's argument that its ambulatory surgery facility will be a separate entity from Providence applies form over substance. Providence will still have ultimate ownership and control of the

venture, with the physicians being employees and not owners of the venture. Providence's ultimate ownership and control is also shown by the fact that Providence, and not PPSC, was the applicant of the CN application that was eventually submitted relating to this venture. AR 145.

As in *MultiCare*, the PPSC physicians will not own or control the venture. Providence's ownership of the venture through a subsidiary does not satisfy the intent behind the private practice exemption, which is explained in Conclusion of Law 2.12 (page 14) in *MultiCare* as follows:

The common meaning of "private" within the CN regulatory context does not include this type of corporate employed physician. Within this context, private physicians or private practice physicians are those who practice privately, as physicians separate from a large non-physician health care entity. The "group practice" exemption to the CN regulation was intended to assist the private practice physician for the treatment of their own patients in their own offices. An interpretation of WAC 246-310-010 that would permit large, non-physician health care entities to utilize the exemption, would create an enormous exemption for hospitals or other non-physician corporations that would defeat the very purpose of the CN law of ambulatory surgical centers.

AR 627.

The analysis in *MultiCare* is consistent with the definition of "private practice" discussed at AR 310 by the Department's Review

Officer below, which is from Merriam Webster's online dictionary (The link to this definition is: <http://www.merriam-webster.com/medical/private%20practice>) and provides as follows:

- 1: practice of a profession (as medicine) independently and not as an employee
- 2: the patients depending on and using the services of a physician in private practice.

In short, regardless of how creative Providence is with its organizational structure, the lack of physician ownership and control disqualifies its venture from the private physician practice exemption.

The *MultiCare* decision, which previous to the present case was the only administrative decision that addressed the private physician practice exemption, was upheld on judicial review appeal under Thurston County Cause No. 07-2-00433-2, wherein Superior Court Judge Pomeroy concluded that the MultiCare project did not meet the criteria for an exemption because the MultiCare physicians were employees, and not owners of the facility. AR 629-630. The *MultiCare* decision was later reversed in an unpublished opinion based upon a procedural issue. See, *MultiCare Health System v. Department of Health, State of Washington, et al.*, Court of Appeals No. 37157-0-II (2008).

Although overturned on appeal based on a procedural issue, the substantive analysis by the Health Law Judge and the Superior Court Judge in *MultiCare* is sound and should be result here. To rule otherwise would improperly create an “enormous exemption” for non-physician corporations that is simply not to be found anywhere in the governing statutes or regulations.

D. PPSC Inappropriately and Selectively Relies on a Few Past CN Program Analyst Decisions.

Rather than address how an entity that is not a sole or group practice can possibly qualify for the private physician practice exemption, PPSC instead attempts to obfuscate the issue by citing CN Program analyst decisions that are at best inconsistent. Nothing in the record supports PPSC’s claim that these past analyst decisions are similar to PPSC’s situation. For example, there is no indication in the record as to how the exemption requests submitted by the Virginia Mason Federal Way ASC and the Kennewick Northwest Practice Management addressed the question of whether they were group practices. It is possible that, unlike PPSC here, both Virginia Mason Federal Way ASC and Kennewick Northwest Practice Management indicated in their exemption requests that they were group practices, thus causing the Department to grant those requests.

In any event, it does not appear that either the Virginia Mason Federal Way ASC or the Kennewick Northwest Practice Management determinations were appealed to the Health Law Judge. Accordingly, these analyst determinations have no value as precedent in the current matter. Health Law Judges (and now review officers) are the final decision makers for the Department in CN matters and need not give any special deference to the determinations of CN Program analysts. *DaVita Inc. v. Department of Health*, 137 Wn.App. 174, 181-183, 887 P.2d 891 (2007).

Further, contrary to PPSC's assertions, the Department has not consistently granted a private physician practice exemption to practices that are owned by another entity. One example to the contrary is the CN Program's February 6, 2009, determination involving the Children's University Medical Group, which had proposed to establish a pediatric ambulatory surgery center in Bellevue. The CN Program concluded that because the proposed ambulatory surgery center would be owned by a separate legal entity (Children's Hospital) the proposed ambulatory surgery center was subject to the CN requirements. See, *Appendix A*.

Unlike the analyst decisions relied upon by Providence, that are at best inconsistent, the *MultiCare* decision, and now the Decision in

this case, are the only persuasive authority as to the Department's interpretation of the private physician practice exemption. Although it was eventually overturned on procedural grounds, thus precluding a court precedent, the *MultiCare* decision still serves as the Department's best analysis as to whether a large, non-physician entity like Providence can qualify for the private physician practice exemption. The *MultiCare* decision also belies PPSC's claim that the Department has somehow changed its interpretation of the exemption.

PPSC's attempt to expand the exemption beyond private physician practices so that it can be utilized by virtually anyone, including large, non-physician entities like Providence, is untenable and wholly inconsistent with the history of the regulation. AR 619-620. As noted by the Health Law Judge in *MultiCare*, such an expansion of the exemption would frustrate the very purpose of the CN provisions, which is for the planned and orderly development of health services that avoids unnecessary duplication of services. AR 623.

E. The *Amisub* Case is Clearly Distinguishable; and Other Red Herrings.

PPSC reaches far and wide in its reliance on *Amisub of South Carolina, Inc. v. South Carolina Dep't of Health and Env'tl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). The *Amisub* case is not only clearly distinguishable, but it did not even decide the issue. Rather, the

Amisub court merely dismissed the case for lack of standing because there was no staff decision below to act as the trigger for a contested case. *Amisub*, 403 S.C. at 596. The *Amisub* court's discussion of the issue in footnote 16 is mere dicta, and has no applicability to Providence's situation.

Unlike the present case, the private physician practice exemption in South Carolina was specifically set forth in statute. By contrast, the applicable statutes in Washington, RCW Chapter 70.38, do not provide for a private practice exemption. Further, the various exemptions that are specifically set forth in the regulations (WAC 246-310-040 through 045) do not apply to ambulatory surgical facilities, ambulatory care facilities, or private physician offices.

The key fact that disqualifies the PPSC venture from the private physician practice exemption is that it is ultimately owned and controlled by a large, non-physician entity, and not by physicians. PPSC does not dispute this fact. *See*, PPSC's Opening Brief, page 9. PPSC also does not dispute that its ambulatory surgery venture is not a solo or group practice. AR 321. There is simply no basis for PPSC's argument that a large, non-physician entity that is not a solo or group practice qualifies for the private physician practice exemption.

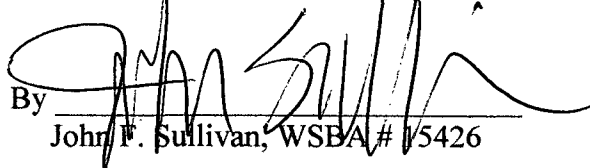
PPSC's argument related to the ownership of the Providence Medical Park building is nothing more than a red herring. It is the ownership and control of the ambulatory surgery facility (i.e., the actual, licensed business) that is germane to the question of whether the exemption applies, and not whether the building it is housed in is owned or leased.

IV. CONCLUSION

PPSC's proposed ambulatory surgery facility does not qualify for the private physician practice exemption and is subject to the CN requirements. Accordingly, the Department's Decision below should be affirmed and PPSC's appeal should be dismissed.

Respectfully submitted this 23rd day of November, 2015.

LAW OFFICES OF JOHN F. SULLIVAN

By 
John F. Sullivan, WSBA # 115426

Attorney for Respondent, Rockwood Health
System d/b/a, Valley Hospital

CERTIFICATE OF SERVICE

I CERTIFY that today I caused to be served the foregoing document on the following persons by email pursuant to the parties' E-service agreement:

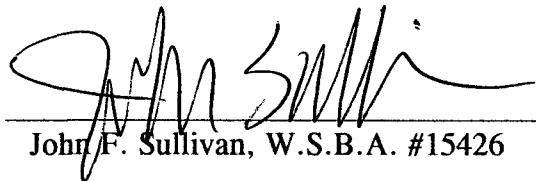
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BY _____
DEPUTY

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of November, 2015, at Issaquah, Washington.


John F. Sullivan, W.S.B.A. #15426

APPENDIX

Department of Health's February 6, 2009, determination concerning Children's University Medical Group's proposed pediatric ambulatory surgery center.

(This document was **Exhibit 4** to the Supplemental Declaration of John F. Sullivan below, but has yet to be included in the adjudicative record as of the filing of this brief. The Adjudicative Clerk was previously notified of this omission but apparently has not yet supplemented the record to include the document.)



STATE OF WASHINGTON
DEPARTMENT OF HEALTH

February 6, 2009

Suzanne Petersen, VP
External Affairs & Guest Services
Seattle Children's Hospital
4800 Sand Point Way Northeast
Seattle, Washington 98105

Dear Ms. Petersen:

Thank you for your December 12, 2008, Determination of Non-Reviewability application and subsequent documentation received on January 23, 2009, related to the establishment of a pediatric ambulatory surgery center associated with Children's University Medical Group (CUMG). Below are the facts relied upon by the Certificate of Need Program in reaching its conclusion regarding your interest in establishing a pediatric Ambulatory Surgical Center (ASC) associated with the CUMG practice.

FACTS

- CUMG is a pediatric practice plan that employs and manages the clinical practices of 379 professional members who are both members of Seattle Children's Hospital medical staff and full-time pediatric faculty members of the University of Washington School of Medicine.
- CUMG's main practice site is the same as Seattle Children's Hospital located at 4800 Sand Point Way Northeast in Seattle, within King County.
- CUMG also has approximately 109 other practice sites in Washington and Alaska. (listing provided in DOR request.)
- Approximately 118 physicians are associated with CUMG. These physicians may practice at more than one of CUMG's practice sites. (listing provided in DOR request.)
- This DOR proposes to establish a pediatric ASC associated with CUMG. The proposed ASC would be located at 1500 - 116th Avenue Northeast in Bellevue, within King County.
- The pediatric ASC will be owned by Seattle Children's Hospital and operated as a department of the hospital.
- Seattle Children's Hospital is a separate legal entity from CUMG.
- No physician outside of the CUMG practice would have access to, or privileges at, the proposed ASC.
- Procedures to be performed at the ASC include those surgeries typically associated with pediatric gastroenterology, general surgery, ophthalmology, orthopedic, otolaryngology, plastic surgery, and urology.
- No management agreement for the ASC is proposed.

Exhibit 4 (1/2)

ANALYSIS

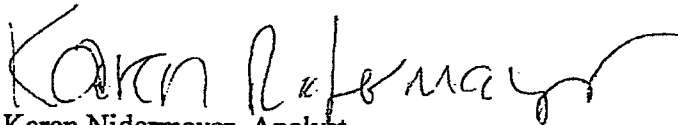
- Revised Code of Washington (RCW) 70.38.105(4) identifies the types of projects subject to prior Certificate of Need review and approval. Subsection (a) identifies that the construction, development, or other establishment of a new health care facility is subject to review.
- RCW 70.38.025(6) defines "health care facility" as *hospices, hospice care centers, hospitals, psychiatric hospitals, nursing homes, kidney disease treatment centers, ambulatory surgical facilities, and home health agencies, and includes such facilities when owned and operated by a political subdivision or instrumentality of the state and such other facilities as required by federal law and implementing regulations, but does not include any health facility or institution conducted by and for those who rely exclusively upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well-recognized church or religious denomination, or any health facility or institution operated for the exclusive care of members of a convent as defined in RCW 84.36.800 or rectory, monastery, or other institution operated for the care of members of the clergy. In addition, the term does not include any nonprofit hospital: (a) Which is operated exclusively to provide health care services for children; (b) which does not charge fees for such services; and (c) if not contrary to federal law as necessary to the receipt of federal funds by the state.*
- Washington Administrative Code (WAC 246-310-010) defines "ambulatory surgical facility" as *any free-standing entity, including an ambulatory surgery center, that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.*

CONCLUSION

Based on the above factual information provided within your application and subsequent documentation, the pediatric ASC would be a separate legal entity from CUMG. As a result, the Certificate of Need Program concludes that the establishment of the pediatric ASC associated with the CUMG practice meets the definition of an ASC under the Certificate of Need provisions of WAC 246-310-010. Therefore, the proposed pediatric ASC is subject to prior Certificate of Need review and approval before it is established.

I understand you currently have an application in review for the establishment of the ASC. Please call me at (360) 236-2957 if you have any questions regarding this determination.

Sincerely,



Karen Nidermayer, Analyst
Certificate of Need Program
Office of Certification and Technical Support

Exhibit 4
(2/2)